In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 879

CLYDE C. RANDOLPH, JR., APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FRROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of the Court, the appellee moves to dismiss this appeal or, in the alternative, to affirm the judgment of the district court.

STATEMENT

This is a direct appeal, under 28 U.S.C. 1253, from an order of a three-judge district court (J.S. App. 8a) granting the government's motion to dismiss the complaint (J.S. App. 1a–7a). The facts are essentially undisputed.

On or about October 1, 1965, appellant, an attorney, was retained by a Mrs. Holder to prosecute her claim for Social Security disability benefits for a contingent fee of one-third of all past-due benefits recovered

(J.S. App. 3a). Prior to retention of counsel, Mrs. Holder's claim had twice been denied by the Social Security Administration (J.S. App. 3a). Subsequently, appellant represented her at an administrative hearing, at which the Hearing Examiner determined that she was disabled. The Social Security Administration thereafter held that she was entitled to benefits from June 1962 (J.S. 7–8). The past-due benefits amounted to $4,866.40 (J.S. App. 3a).

Appellant filed a petition with the Social Security Administration for an attorney's fee of $1,577.33, *i.e.*, one-third of the total past-due benefits (J.S. App. 4a). The Social Security Administration, acting under 42 U.S.C. (1964 ed., Supp. II) 406(a), authorized him to charge and receive a fee of $750.00 for his representation of the claimant (J.S. App. 4a).

Appellant brought this suit in the court below for a declaratory judgment declaring 42 U.S.C. 406(a) and the Regulations issued by the Secretary thereunder unconstitutional. The three-judge district court held that Congress can constitutionally regulate the attorney's fees for the administrative services rendered by counsel for Social Security claimants (J.S. App. 5a–6a) and that the Secretary's regulations were valid (J.S. App. 7a).

ARGUMENT

As the district court recognized this case presents no substantial constitutional question. Nor is there any disagreement in the decided cases. See *Chernock* v. *Gardner*, 360 F. 2d 257 (C.A. 3); *Gardner* v. *Me-*

nendez, 373 F. 2d 488 (C.A. 1), and *Robinson* v. *Gardner,* 374 F. 2d 949 (C.A. 4).

1. In enacting 42 U.S.C. 406(a), Congress expressly authorized the Social Security Agency to prescribe regulations concerning the practice of attorneys before the Board "[f]or the the purpose of protecting claimants and beneficiaries" (H. Rep. No. 728, 76th Cong., 1st Sess. at 44–45; S. Rep. No. 734, 76th Cong., 1st Sess. at p. 53). The legislative history further pointed out (*ibid.*):

> * * * While it is not contemplated that the services of an agent or attorney will be necessary in presenting the vast majority of claims, the experience of other agencies would indicate that where such services are performed the fees charged therefor should be subject to regulation by the Board, and it is so provided. The provision is similar to the statute (5 U.S.C., sec. 261) giving the Treasury Department comparable authority. * * *

Nor can there be any doubt that Congress may constitutionally regulate the fees which attorneys may charge in such cases. *Calhoun* v. *Massie,* 253 U.S. 170, 173; *Margolin* v. *United States,* 269 U.S. 93; *Hines* v. *Lowrey,* 305 U.S. 85. As Mr. Justice Brandeis recognized in *Calhoun* v. *Massie, supra* at 174–176, "by the enactment * * * of laws * * * placing limitations upon the fees properly chargeable for services Congress has sought both to prevent the stirring up of unjust claims against the Government and to reduce the temptation to adopt improper methods of * * * compensation."

We dispute appellant's suggestion that the fee of $750.00, allowed by the Secretary in this case, rather

than the outright one-third requested,[1] precludes effective legal representation of Social Security claimants in the administrative proceedings. But in all events, as the court below observed, if the fee restriction places too great a burden on attorneys, "the change * * * should be attempted through legislative channels" and not the courts (J.S. App. 6a).[2]

2. Nor is there substance to appellant's contention that 42 U.S.C. 406(a) and the administrative regulations issued thereunder encroach on the judiciary. (J.S 5). As the court below noted, these restrictions do not even raise the question of judicial encroachment since they "relate only to attorney's fees in connection with claims before an executive officer" (J.S. App. 6a). See *Chernock* v. *Gardner*, 360 F. 2d 257 (C.A. 3); *Robinson* v. *Gardner*, 374 F. 2d 949 (C.A. 4), reversing *Robinson* v. *Celebrezze*, 248 F. Supp. 149 (W.D.S.C.). It is logical that "the agency before whom services were rendered should be the one to determine their value." *Gardner* v. *Menendez*, 373 F. 2d 488, 490 (C.A. 1).

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[1] The 1965 amendments to the Social Security Act, 42 U.S.C. (1964 ed. Supp. II) 406(b), limited the judicial authority to set a fee for the attorney's in-court services in an amount not to exceed 25% of the past-due benefits.

[2] The cases cited by appellant concerning the need for counsel in criminal proceedings and the right of a state to regulate group law practices in civil rights cases, personal injury suits and workmen's compensation proceedings are plainly not applicable to the present case involving the administration of a program set up by Congress to provide support for a claimant when he was no longer able to work (*Social Security Board* v. *Nierotko*, 327 U.S. 358, 364) and "subject to its regulation" (J.S. App. 5a).

3. Finally, appellant contends that 42 U.S.C. 406(a) unconstitutionally delegates legislative power to an administrative agency (J.S. 5). But there can be no question at this late date that Congress may "clothe executive officers with the discretion to fill in the details" to insure the flexibility needed to properly administer programs such as that embodied in the Social Security Act. *Yakus* v. *United States*, 321 U.S. 414, 425 (J.S. App. 6a–7a). Contrary to appellant's assertions, the Secretary has adequately filled in the details and has set forth the factors to be considered administratively in evaluating a petition for an attorney's fee. 32 F.R. 7750, 7751 (App. *infra*, pp. 7–10).

CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the judgment of the district court should be affirmed.

Respectfully submitted.

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